

1  
2  
3  
4  
5  
6  
7                   UNITED STATES DISTRICT COURT  
8                   WESTERN DISTRICT OF WASHINGTON  
9                   AT TACOMA

10                  IMIOLA P.,

11                  Plaintiff,

12                  v.

13                  NANCY A. BERRYHILL,  
14                  Commissioner of Social Security,

15                  Defendant.

CASE NO. 3:18-cv-5271 TSZ JRC

REPORT AND RECOMMENDATION  
ON PLAINTIFF'S COMPLAINT

NOTING DATE: March 1, 2019

16                  This matter has been referred to United States Magistrate Judge J. Richard Creatura  
17 pursuant to 28 U.S.C. § 636(b)(1) and Local Magistrate Judge Rule MJR 4(a)(4), and as  
18 authorized by *Mathews, Secretary of H.E.W. v. Weber*, 423 U.S. 261, 271-72 (1976). This  
19 matter has been fully briefed. *See* Dkts. 11, 15, and 16.

20                  After considering and reviewing the record, the Court finds that the ALJ improperly  
21 discounted the opinion of psychologist Bryan Zolnikov, Ph.D as well as a medical source  
22 statement by counselor Maiya Bailey, MA. These errors were not harmless because had the ALJ  
23 properly considered assessments by Ms. Bailey and Dr. Zolnikov concerning plaintiff's

1 limitations in sustaining a work schedule, the ALJ may have included additional limitations in  
2 plaintiff's residual functional capacity, and in the hypothetical presented to the vocational expert.  
3 Therefore, this Court recommends that this case be reversed and remanded pursuant to sentence  
4 four of 42 U.S.C. §405 (g).

5

6 BACKGROUND

7 Plaintiff, Imiola J.P., was born in 1985 and was 29 years old on the alleged date of  
8 disability onset of April 8, 2015. *See AR.* 141, 16. Plaintiff completed 11th grade, and has past  
9 work at Target and at a warehouse. AR. 42, 248. Plaintiff testified that she was fired from both  
10 positions due to altercations with coworkers. AR. 43-44.

11 According to the ALJ, plaintiff has at least the severe impairments of schizoaffective  
12 disorder, posttraumatic stress disorder ("PTSD"), and right shoulder bursitis and tendinitis. AR.  
13 18. At the time of the hearing, plaintiff was living with roommates. AR. 86.

14

15 PROCEDURAL HISTORY

16 Plaintiff's application for Supplemental Security Income ("SSI") benefits pursuant to 42  
17 U.S.C. § 1382(a) (Title XVI) of the Social Security Act was denied initially and following  
18 reconsideration. *See AR.* 1. Plaintiff's requested hearing was held before Administrative Law  
19 Judge Allen G. Erickson ("the ALJ") on November 29, 2016. *See AR.* 35. On January 12, 2017,  
20 the ALJ issued a written decision in which the ALJ concluded that plaintiff was not disabled  
21 pursuant to the Social Security Act. *See AR.* 16-29.

22 On February 9, 2018, the Appeals Council denied plaintiff's request for review, making  
23 the written decision by the ALJ the final agency decision subject to judicial review. AR. 1; *see*

24

1 || 20 C.F.R. § 404.981. On April 9, 2018, plaintiff filed a complaint in this Court seeking judicial  
2 || review of the ALJ's written decision. Dkt. 4.

## STANDARD OF REVIEW

Pursuant to 42 U.S.C. § 405(g), this Court may set aside the Commissioner's denial of social security benefits if the ALJ's findings are based on legal error or not supported by substantial evidence in the record as a whole. *Bayliss v. Barnhart*, 427 F.3d 1211, 1214 n.1 (9th Cir. 2005) (citing *Tidwell v. Apfel*, 161 F.3d 599, 601 (9th Cir. 1999)).

## DISCUSSION

11 Plaintiff seeks reversal of the ALJ’s decision and requests that the case be remanded for  
12 an award of benefits, arguing that the ALJ erred by: (1) giving insufficient weight to the opinion  
13 of psychologist Bryan Zolnikov, Ph.D.; (2) giving insufficient weight to the medical source  
14 statement of counselor Maiya Bailey, MA; (3) giving insufficient weight to several medical  
15 opinions from before the alleged onset date; (4) giving improper weight to the opinions of state  
16 agency psychologists Gary L. Nelson, Ph.D., and Thomas Clifford Ph.D.; and (5) improperly  
17 discounting evidence of disabling symptoms in plaintiff’s treatment record.

**1. Whether the ALJ properly discounted the psychiatric evaluation by Bryan Zolnikov, Ph.D.**

Plaintiff contends the ALJ provided insufficient reasons to give little weight to a March 17, 2016 psychiatric evaluation by examining psychologist Bryan Zolnikov, Ph.D. Dkt. 11, p. 3 (citing AR. 539). The Court agrees.

An ALJ must provide “clear and convincing” reasons for rejecting the uncontradicted opinion of either a treating or examining physician or psychologist. *Lester v. Chater*, 81 F.3d

1 821, 830 (9th Cir. 1996) (internal citations omitted). When a treating or examining physician's  
 2 opinion is contradicted, that opinion can be rejected "for specific and legitimate reasons that are  
 3 supported by substantial evidence in the record." *Id.* at 830-31. The ALJ can accomplish this by  
 4 "setting out a detailed and thorough summary of the facts and conflicting clinical evidence,  
 5 stating his interpretation thereof, and making findings." *Reddick v. Chater*, 157 F.3d 715, 725  
 6 (9th Cir. 1998) (internal citations omitted).

7 In the March 17, 2016 psychiatric evaluation, Dr. Zolnikov diagnosed psychosis with  
 8 hallucinations, severe PTSD, major depressive disorder, and panic disorder. He assessed marked  
 9 limitations in (1) performing activities within a schedule, maintaining regular attendance, and  
 10 being punctual within customary tolerances without special supervision; (2) communicating and  
 11 performing effectively in a work setting; (3) maintaining appropriate behavior in a work setting;  
 12 and (4) completing a normal work day and work week without interruptions from  
 13 psychologically based symptoms. AR. 539.

14 The ALJ gave this opinion little weight, noting that

15 [I]t is inconsistent with the doctor's essentially unremarkable mental status  
 16 examination of the claimant. The doctor found she had normal thought process  
 17 and content, orientation, memory, fund of knowledge, concentration, abstract  
 18 thought, and insight and judgment. It appears the doctor relied heavily on the  
 19 claimant's subjective report of symptoms and limitations, which are not fully  
 20 consistent with the medical evidence and the record as a whole.

21 AR 26. Even though Dr. Zolnikov's assessment is contradicted by the state agency psychologists,  
 22 the ALJ's reasons are not sufficiently specific and legitimate to discount Dr. Zolnikov's  
 23 conclusions. AR. 130. While the ALJ considered plaintiff's mental status examination results  
 24 "unremarkable," Dr. Zolnikov found in the mental status examination that plaintiff's perception  
 was outside normal limits, noting that plaintiff endorsed auditory and visual hallucinations. AR.  
 540. Furthermore, the ALJ made no attempt to explain how the normal findings in other areas of

1 cognitive functioning are inconsistent with the assessed limitations. Although an ALJ may “draw  
2 inferences logically flowing from the evidence,” *Sample v. Schweiker*, 694 F.2d 639, 642 (9th Cir.  
3 1982) (internal citations omitted), an ALJ may not speculate. *See* SSR 86-8, 1986 SSR LEXIS 15  
4 at \*22. Furthermore, judges have been cautioned to resist the temptation to interpret raw medical  
5 evidence because lay intuitions about medical phenomena are often wrong. *Schmidt v. Sullivan*,  
6 914 F.2d 117, 118 (7th Cir. 1990).

7 Here, the limitations assessed by Dr. Zolnikov primarily concern social limitations and an  
8 inability to comply with employer expectations regarding schedule and attendance. *See* AR. 539.  
9 It is not evident that these limitations rely on deficits in thought process, content, orientation,  
10 memory, fund of knowledge, concentration, abstract thought, insight, and judgment. Thus,  
11 normal functioning in these areas is not necessarily inconsistent with the assessed marked  
12 limitations. The link is even weaker considering that mental status examinations tend to be  
13 performed in a secure environment and devoid of the situational stressors that plaintiff testified  
14 prevent her from working. *See, e.g.*, AR. 54. Thus, the alleged inconsistency between plaintiff’s  
15 mental status examination and the assessed limitations is not a sufficiently specific and  
16 legitimate reason to discount Dr. Zolnikov’s opinion.

17 Second, while Dr. Zolnikov assessed several limitations regarding plaintiff’s ability to  
18 comply with employer expectations regarding schedule and attendance, the ALJ failed to make  
19 alternate findings regarding plaintiff’s abilities in this area. When rejecting physicians’ opinions,  
20 the “[t]he ALJ must do more than offer his conclusions. He must set forth his own interpretations  
21 and explain why they, rather than the doctors’, are correct.” *Reddick*, 157 F.3d at 725. Although  
22 the ALJ found Dr. Zolnikov over-relied on plaintiff’s subjective statements, the ALJ failed to  
23  
24

1 advance a legitimate reason for why plaintiff's capabilities exceeded the limitations assessed by  
2 Dr. Zolnikov.

3 Moreover, the state agency psychologists to whom the ALJ gave great weight assessed  
4 moderate limitations in completing a normal work day/week. AR. 130, 145. The ALJ did not  
5 include these limitations in plaintiff's RFC. *See* AR. 20-21. Therefore, it is uncontradicted that  
6 plaintiff would have some impairment to her ability to maintain a schedule, and no such  
7 limitation was included in plaintiff's RFC.

8 Under these circumstances, substantial evidence does not support the ALJ's RFC  
9 determination, which contains no limitations regarding plaintiff's ability to complete a normal  
10 work day/week. Whenever reviewing an ALJ's error, the court must also evaluate whether that  
11 error was harmless. Harmless error occurs when it is clear from the record that the ALJ's error  
12 was inconsequential to the ultimate nondisability determination. *See Stout v. Comm'r, Soc. Sec.*  
13 *Admin.*, 454 F.3d 1050, 1055 (9th Cir. 2006). As noted, Dr. Zolnikov assessed marked  
14 limitations in performing activities within a schedule, maintaining regular attendance, being  
15 punctual within customary tolerances without special supervision, and completing a normal work  
16 day and work week without interruptions from psychologically based symptoms. AR. 539. These  
17 limitations were not included in the ALJ's assessment of plaintiff's residual functional capacity.  
18 *See* AR. 20-21. Had the ALJ ascribed greater weight to the limitations assessed by Dr. Zolnikov,  
19 the ALJ may have incorporated greater limitations into plaintiff's RFC. In turn, these limitations  
20 may have been conveyed to the vocational expert, affecting the ultimate disability determination.  
21 Therefore, the ALJ's error was not harmless.

22 //

23 //

1           **II.     Whether the ALJ properly discounted the medical source statement by**  
 2           **counselor Maiya Bailey, M.A.**

3           Plaintiff contends the ALJ provided insufficient reasons to reject the limitations assessed  
 4           by Counselor Maiya Bailey, MA on October 21, 2016. The Court agrees.

5           Federal regulations establish a distinction between “acceptable medical sources,” such as  
 6           licensed physicians, and other medical sources, such as nurse practitioners, physician assistants,  
 7           and therapists. *See Turner v. Comm’r of Soc. Sec.*, 613 F.3d 1217, 1223-24 (9th Cir. 2010)  
 8           (citing 20 C.F.R. § 404.1513(a), (d)); Social Security Ruling “SSR” 06-3p, 2006 SSR LEXIS 5  
 9           at \*4-\*5, 2006 WL 2329939. While opinions from other medical sources may be relevant to  
 10          determining impairment severity, an ALJ may disregard evidence from an “other source,” “if the  
 11          ALJ ‘gives reasons germane to each witness for doing so.’” *Turner*, 613 F.3d at 1224 (internal  
 12          citations omitted).

13          Ms. Bailey, who is a counselor at Greater Lakes Mental Healthcare, qualifies as an “other  
 14          source.” *See Haagenson v. Colvin*, 656 F. App’x 800, 802 (9th Cir. 2016). In her October 21,  
 15          2016 medical source statement, she assessed mild to marked limitations in various categories of  
 16          mental functioning. AR. 608-610. The ALJ gave her medical source statement little weight  
 17          because “it is conclusory, providing no explanation of the evidence relied on in forming that  
 18          opinion . . . . In addition, the opinion is inconsistent with the counselor’s essentially  
 19          unremarkable mental status examinations of the claimant.” AR. 27 (citing AR. 693, 711, 723,  
 20          734, 736, 744, and 749).

21          The ALJ’s reasons for giving little weight to Ms. Bailey’s medical source statement do  
 22          not suffice because they are not substantiated by the record. The interpretation that Ms. Bailey  
 23          provided “no explanation of the evidence relied on in forming [her] opinion” is not reasonable in  
 24          light of the structure of the medical source statement form and Ms. Bailey’s comments at the end

1 of the check box form. Directions at the top of the medical source statement note: “it is essential  
2 that your responses and comments be based on your clinical assessment of the individual’s  
3 current and past mental limitations and not on non-medical factors.” AR. 608. Furthermore, Ms.  
4 Bailey stated in the comment section of the form, “Please note that this client has received  
5 services at Greater Lakes Mental Healthcare for mental health services previous to this episode  
6 of care that began on 2/19/2015. I cannot speak to or assess her symptoms from any previous  
7 episodes of care.” Although the Ninth Circuit has held that an “ALJ may permissibly reject  
8 check off reports that do not contain any explanation of the bases of their conclusions,” *Molina v.*  
9 *Astrue*, 674 F.d 1104, 1111 (internal quotations omitted), the structure of the medical source  
10 statement and Ms. Bailey’s comments lead to the conclusion that Ms. Bailey’s opinion relied on  
11 plaintiff’s record of care at Greater Lakes Mental Healthcare. Moreover, the ALJ may not reject  
12 a treating provider’s opinion as conclusory when it is consistent with the doctor’s own treating  
13 notes. *See Burrell v. Colvin*, 775 F.3d 1133, 1140 (9th Cir. 2014). Here, the record contains over  
14 150 pages of counselor Bailey’s treatment notes, which are not inconsistent with her assessment.  
15 *See generally* AR. 611-765.

16 Second, there is no apparent inconsistency between the limitations assessed by Ms.  
17 Bailey and the mental status examinations she performed on plaintiff. Although records of the  
18 mental status examinations do not note the same limitations that Ms. Bailey assessed in her  
19 medical source statement—i.e. mild to marked limitations in various mental abilities—the cited  
20 mental status examinations are not constructed to assess functional limitations. They are check  
21 box forms, which provide the opportunity to note the presence of symptomology such as  
22 agitation and low energy and whether or not thought processes and psychotic features were  
23 within normal limits. *See, e.g.*, AR. 693. Although the cited mental status examinations generally  
24

1 note that plaintiff's appearance/speech, thought process, and psychotic features were within  
 2 normal limits, various reports note low energy, agitation, anxiety, tangential speech, irritability,  
 3 and depressed mood. *See* AR. 711, 736, 744, and 749. These raw findings do not show whether  
 4 or not functional limitations are present, and therefore do not form a proper basis for an ALJ, to  
 5 disregard an assessment of functional limitations.

6 In sum, the reasons the ALJ provided to ascribe little weight to Ms. Bailey's medical  
 7 source statement are not substantiated by the record. Under these circumstances, the ALJ has not  
 8 provided a reason germane to Ms. Bailey to reject her medical source statement. Therefore, it  
 9 was error to not ascribe greater weight to the limitations assessed by Ms. Bailey.

10 The ALJ's error in assessing Ms. Bailey's medical opinion is not harmless. See *Stout v.*  
 11 *Comm'r, Soc. Sec. Admin.*, 454 F.3d 1050, 1055 (9th Cir. 2006). Ms. Bailey opined that plaintiff  
 12 has marked limitations in several categories of mental functioning, including (1) ability to  
 13 perform activities within a schedule, maintain regular attendance, and be punctual within  
 14 customary tolerances; and (2) ability to complete a normal workday and workweek without  
 15 interruptions from psychologically based symptoms and to perform at a consistent pace without  
 16 an unreasonable number and length of rest periods. AR. 608-610. These limitations were not  
 17 included in the ALJ's analysis of plaintiff's RFC. *See* AR. 20-21. Had the ALJ ascribed greater  
 18 weight to the limitations assessed by Ms. Bailey, the ALJ may have incorporated greater  
 19 limitations into plaintiff's RFC. In turn, these limitations may have been conveyed to the  
 20 vocational expert, affecting the ultimate disability determination. Therefore, the ALJ's error was  
 21 not harmless.

22 //

23 //

1           **III. Plaintiff's remaining arguments.**

2           Plaintiff also alleges that the ALJ erred by giving insufficient weight to several medical  
 3 opinions from before the alleged onset date; giving improper weight to the opinions of state  
 4 agency psychologists Gary L. Nelson, Ph.D., and Thomas Clifford Ph.D.; and improperly  
 5 discounting evidence of disabling symptoms in plaintiff's treatment record. As discussed in  
 6 sections above, the ALJ erred in his assessment of Dr. Zolnikov's and counselor Bailey's  
 7 medical opinions. The omission of at least moderate limitations to schedule and punctuality  
 8 resulted in an incomplete RFC. Therefore, the ALJ should reassess plaintiff's RFC on remand.

9           On remand, plaintiff will be able to present new evidence and new testimony. *See*  
 10 Program Operations Manual System (POMS), GN 03106.036 Court Remand Orders,  
 11 <https://secure.ssa.gov/poms.nsf/lnx/0203106036> (last visited February 14, 2019) ("[A] court  
 12 order vacating the [ALJ's] prior decision and remanding the case to the Commissioner voids the  
 13 prior decision ... and thus returns the case to the status of a claim "pending" before SSA....The  
 14 ALJ processes the case in the same way as a regular hearing and issues a decision."); *see also*  
 15 *Bartlett v. Berryhill*, 2017 WL 2464117, at \*4 (W.D. Wash. June 7, 2017). The ALJ's  
 16 reconsideration of the medical evidence and any new evidence or testimony may impact his  
 17 assessment of plaintiff's subjective testimony, which may also lead to additional limitations to  
 18 plaintiff's RFC. Therefore, on remand, the ALJ must reconsider the record as a whole.

19           **IV. Remedy.**

20           Lastly, plaintiff requests that the Court remand this case for an award of benefits. Dkt. 11  
 21 at 4. The Court may remand a case "either for additional evidence and findings or to award  
 22 benefits." *Smolen v. Chater*, 80 F.3d 1273, 1292 (9th Cir. 1992). Generally, when the court  
 23 reverses an ALJ's decision, "the proper course, except in rare circumstances, is to remand to the  
 24

agency for additional investigation or explanation.” *Benecke v. Barnhart*, 379 F.3d 587, 595 (9th Cir. 2004) (citations omitted). However, the Ninth Circuit created a “test for determining when evidence should be credited and an immediate award of benefits directed.” *Harman v. Apfel*, 211 F.3d 1172, 1178 (9th Cir. 2000). Specifically, benefits should be awarded where:

(1) the ALJ has failed to provide legally sufficient reasons for rejecting [the claimant's] evidence, (2) there are no outstanding issues that must be resolved before a determination of disability can be made, and (3) it is clear from the record that the ALJ would be required to find the claimant disabled were such evidence credited.

<sup>8</sup> *Smolen*, 80 F.3d at 1292.

9       Here, there are factual issues that need to be resolved. As discussed in section one, the  
10      ALJ failed to include in the RFC any limitations to plaintiff’s ability to maintain a schedule. All  
11      psychologists in the record agree that plaintiff has at least moderate limitations in this area. The  
12      Social Security Program Operations Manual System (“POMS”) describes moderate mental  
13      limitations as “fair.” POMS DI § 34001.032(F)(2).<sup>1</sup> “Fair” falls between slightly limited (mild)  
14      and seriously limited (marked). *Id.* Given the vagueness of these definitions, it is unclear how a  
15      moderate limitation to attendance and punctuality will translate as a limitation in the RFC. This  
16      determination is a function of the ALJ and the vocational expert, not the District Court.  
17      Therefore, remand for further consideration is the appropriate remedy.

## CONCLUSION

20 Based on these reasons, and the relevant record, the undersigned recommends that this  
21 matter be **REVERSED** and **REMANDED** pursuant to sentence four of 42 U.S.C. § 405(g) to

<sup>1</sup> POMS DI § 34001.032(F)(2) available at <https://secure.ssa.gov/poms.nsf/lnx/0434001032>, last visited December 19, 2018.

1 the Acting Commissioner for further consideration. **JUDGMENT** should be for **PLAINTIFF**  
2 and the case should be closed.

3 Pursuant to 28 U.S.C. § 636(b)(1) and Fed. R. Civ. P. 72(b), the parties have fourteen  
4 (14) days from service of this Report to file written objections. *See also* Fed. R. Civ. P. 6.  
5 Failure to file objections will result in a waiver of those objections for purposes of de novo  
6 review by the district judge. *See* 28 U.S.C. § 636(b)(1)(C). Accommodating the time limit  
7 imposed by Rule 72(b), the clerk is directed to set the matter for consideration on March 1, 2019,  
8 as noted in the caption.

9 Dated this 14th day of February, 2019.

10  
11  
12   
13 J. Richard Creatura  
14 United States Magistrate Judge  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24